2-18-2014

State v. Whitley Appellant's Brief Dckt. 41327

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. KENNETH JAY WHITLEY, Defendant-Appellant.	NO. 41327 ADA COUNTY NO. CR 2010-17700 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Kenneth Jay Whitley timely appeals from the district court's order revoking probation. On appeal, Mr. Whitley argues that the Idaho Supreme Court denied him due process and equal protection when it refused to augment the appellate record with various transcripts. Additionally, Mr. Whitley argues that the district court abused its discretion when it revoked his probation and when it denied his oral request for a sentence reduction.

Statement of the Facts and Course of Proceedings

Mr. Whitley and some of his friends decided to "jump" one of their high school classmates. (Presentence Investigation Report (*hereinafter,* PSI), p.151.) The boys surrounded the victim at a park. According to the victim, Mr. Whitley started punching the victim. (PSI, p.151.) According to other eye witnesses, Mr. Whitley was present but did not punch the victim. (PIS, p.153.) The victim fell down and lost consciousness. (PSI, p.151.) Eighty dollars was then stolen from the victim. (PSI, p.151.)

Mr. Whitley was charged, by information, with robbery and conspiracy to commit robbery. (R., pp.26-28.) Pursuant to a plea agreement, Mr. Whitley pleaded guilty to conspiracy to commit robbery and, in return, the State agreed to dismiss the remaining charge. (R., pp.32-33, 36, 46-47.) Thereafter, the district court imposed a unified sentence of fifteen years, with five years fixed, and retained jurisdiction. (R., pp.46-48.) Upon review of Mr. Whitley's period of retained jurisdiction (*hereinafter,* rider), the district court again suspended the sentence and placed Mr. Whitley on probation. (R., pp.56-59.)

After a period of probation, the State filed a motion for a bench warrant for a probation violation alleging that Mr. Whitley violated the terms of his probation. (R., pp.64-66.) Mr. Whitley admitted to violating the terms of his probation by changing his residence without permission, failing to complete an aftercare treatment program, and failing to pay fines and fees. (R., pp.64-66, 80.) The district court revoked probation and retained jurisdiction. (R., pp.82-83.) Upon review of Mr. Whitley's second rider, the district court again suspended the sentence and placed Mr. Whitley on probation. (R., pp.87-90.)

After a second period of probation, the State filed a motion for probation violation and an amended motion for probation violation alleging that Mr. Whitley violated the terms of his probation. (R., pp.104-106, 137-139.) Mr. Whitley admitted to violating the terms of his probation by smoking marijuana, absconding supervision, and failing to pay restitution. (Tr., p.10, L.15 - p.11, L.9.) At the final probation violation disposition hearing, Mr. Whitley orally requested a sentence reduction. (Tr., p.23, Ls.5-10.) The district court revoked probation and executed the underlying sentence without reduction. (R., pp.148-149: Tr., p.31, Ls.17-24.) Mr. Whitley timely appealed. (R., pp.151-153.)

On appeal, Mr. Whitley filed a motion to augment the record with various transcripts. (Motion to Augment, pp.1-5.) The State objected to Mr. Whitley's request for the transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof" (*hereinafter,* Objection to Motion to Augment), pp.1-5.) Thereafter, the Idaho Supreme Court entered an order denying Mr. Whitley's request for the transcripts of the change of plea hearing held on November 19, 2010, sentencing hearing held on January 7, 2011, rider review hearing held on June 3, 2011, probation violation admission hearing held on January 20, 2012,

probation violation disposition hearing held on February 3, 2012, and the rider review hearing held on July 13, 2012. (Order Denying Motion to Augment and to Suspend the Briefing Schedule (*hereinafter,* Order Denying Motion to Augment), p.1.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Whitley due process and equal protection when it denied his motion to augment the record on appeal with transcripts necessary for review of the issues on appeal?

2. Did the district court abuse its discretion when it revoked Mr. Whitley's probation?

3. Did the district court abuse its discretion when it denied Mr. Whitley's oral request for a sentence reduction?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Whitley Due Process And Equal Protection When It Denied His Motion To Augment The Record On Appeal With Transcripts Necessary For Review Of The Issues On Appeal

A. Introduction

The United States Supreme Court has repeatedly held that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. In the event the record reflects a "colorable need" for a transcript, the only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues on appeal or if a sufficient substitute for the transcript exists.

In this case, the Idaho Supreme Court denied Mr. Whitley's request for transcripts of the sentencing hearing held on January 7, 2011, the rider review hearing held on June 3, 2011, the probation violation disposition hearing held on February 3, 2012, and the rider review hearing held on July 13, 2012. (Order Denying Motion to Augment), p.1.) On appeal, Mr. Whitley is challenging the Idaho Supreme Court's denial of his request for these transcripts. Mr. Whitley asserts that the requested transcripts are relevant to the issue of whether the district court abused its discretion when it failed to grant his oral request for a sentence reduction because the applicable standard of review requires an appellate court to conduct an independent review of the entirety of the proceedings in order to evaluate the district court's sentencing decisions. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court, By Failing To Provide Mr. Whitley With Access To The Requested Transcripts, Has Denied Him Due Process And Equal Protection Because He Cannot Obtain A Merits-Based Appellate Review Of His Sentencing Claims

The constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; IDAHO CONST. art. I § 13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Sec. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). The Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is statutory. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a relevant transcript, the transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to "order a transcript to be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983). Additionally, an appeal from the denial of an Idaho Criminal Rule 35(b) motion is an appeal as of right as defined by Idaho Appellate Rule 11(c)(9). *See State v. Fuller*, 104 Idaho 891 (Ct. App. 1983) (holding an order denying a motion for reduction of sentence under Rule 35 is an appealable order pursuant to then I.A.R. 11(c)(6)).

The United States Supreme Court has issued a long line of opinions directly addressing whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with appellate records unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois*, 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished [to] them without cost." *Griffin*, 351 U.S. at 13. At that time,

the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process and equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with a crime must, so far as the law is concerned, 'stand on equal footing before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on the account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective, merits-related appellate review. At the same time, the

Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet accurate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of the defendant's indigency. The United States Supreme Court held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* at 257. "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *Draper v. Washington*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining whether access to transcripts based on a frivolousness standard. "Under the present standard, ... [the appellants] must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 327 U.S. at 494. The Court first expanded upon its holding in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised on appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it held "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds. *Id* at 195.

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardner v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

If the record establishes that the requested transcripts might be relevant to the issues on appeal, due process and equal protection mandate that those transcripts be created at the public's expense, unless the State can prove that the requested transcripts are not relevant to the issues on appeal.

C. The Requested Transcripts Are Relevant To Mr. Whitley's Appeal Because He Is Challenging The Length Of His Sentence And The Applicable Standard Of Review Requires An Appellate Court To Independently Review The Entire Record Before The District Court

The requested transcripts are necessary for review of the issue raised in this appeal because they are within an Idaho appellate court's scope of review. "In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing . . . . " *State v.*

Pierce, 150 Idaho 1, 5 (2010); *see also State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009).

In this case, Judge Hansen presided over the final disposition hearing held on August 16, 2013, where the district court made the sentencing related decisions that are being challenged on appeal. (R., p.147.) Judge Hansen also presided over the sentencing hearing held on January 7, 2011, the rider review hearing held on June 3, 2011, the probation violation disposition hearing held on February 3, 2012, and the rider review hearing held on July 13, 2012. (R., pp., 44, 53, 81, 86.) At each of these hearings, Mr. Whitley addressed the district court. (R., pp.45, 54, 81, 86.) The following authority establishes that the transcripts of those hearings will be necessary for an appellate court to review the merits of Mr. Whitley appellate sentencing claims.

The Idaho Supreme Court issued an opinion in *State v. Brunet*, ___ Idaho ___, 316 P.3d 640 (2013), which addressed the scope of review of an appeal filed from an order revoking probation, wherein the appellant argued that his sentence was excessively harsh. In that case, the Idaho Supreme Court determined that the defendant had not demonstrated a colorable need for the requested transcripts, and so, there was no violation of the defendant's rights by denying him copies of the transcripts at issue in that case. *Brunet*, 316 P.3d at 643. However, the Court did not change any of the pre-existing standards governing what transcripts are necessary for appellate review. *See generally id.* In fact, it reaffirmed the standard discussed in *Pierce* – that where the length of the sentence is at issue, the appellate court will conduct an independent review of the entire record available to the district court. *Id.* At best, the *Brunet* Opinion provides no guidance for determining whether requested transcripts are

necessary to address merits of sentencing related issues. At worst, *Brunet* contravenes United States Supreme Court authority and the Fourteenth Amendment.

Additionally, the Idaho Supreme Court characterized Brunet's request for transcripts of prior proceedings as a mere "fishing expedition" at taxpayer expense because Brunet could not identify a specific need for the transcripts prior to the creation of the transcripts. *Id.* The fact that Brunet could not establish, prior to production of the requested transcripts, the contents of those transcripts, or exactly how those contents would have impacted the claim(s) raised in that appeal, does not mean that Mr. Whitley, who is situated substantially similarly to Brunet, cannot establish a colorable need for the transcripts. As Justice Goldberg has explained, it is appellate counsel's job to search the record for viable appellate issues:

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (footnote and citation omitted).[1] Clearly then, appellate counsel cannot know the evidence and the claims to be raised on appeal *before* reviewing the record in a given case. And this

[1] In *Hardy*, the Supreme Court evaluated a federal statute and, therefore, did not "reach a consideration of constitutional requirements." *Hardy*, 375 U.S. at 282. Nevertheless, it is notable that in that case, the Supreme Court made it clear that especially in instances where the indigent defendant is provided new counsel for purposes of appeal, his counsel cannot do his job without a full transcript. *See id.* Further, Justice Goldberg, who was joined by Chief Justice Warren, and Justices Brennan and Stewart, wrote separately to argue that the Court should have gone further: "[I]n the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal criminal cases to defendants who cannot afford to purchase them, whenever they seek to prosecute an appeal." *Id.* (Goldberg, J., concurring).

is especially true where Mr. Whitley is acting through appellate attorneys who did not represent him below. *See id.* ("The opinion of the Court agrees with this conclusion as it relates to 'one whose lawyer on appeal enters the case after the trial is ended.' I believe that it is equally applicable to one whose appointed lawyer on appeal was also his lawyer at trial.") Since, the Idaho Legislature chose to create the State Appellate Public Defender to represent indigent defendants *on appeal only* and, therefore, the vast majority of felony appeals are handled by attorneys with no first-hand knowledge of the proceedings below, *see* I.C. § 19-870, it would be particularly unreasonable to require the defendant to show what the specific evidence in the record is, and how that specific evidence will impact the claims to be raised on appeal, before he is entitled to an adequate appellate record.

The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, 153 Idaho 618 (Ct. App. 2012), which attempted to address the scope of review of an appeal filed from an order revoking probation and clarify the circumstances under which transcripts of prior proceedings will be necessary for it to address the merits of Morgan's appellate claims. In that case, the defendant pleaded guilty and was placed on probation. *Id.* at 619. After a period of probation, the defendant admitted to violating the terms of his probation and the district court revoked probation, but retained jurisdiction. *Id.* at 619-620. The defendant subsequently admitted to violating the terms of his probation and the district court revoked probation. *Id.* The defendant appealed from the district court's second order revoking probation. *Id.*

On appeal, the defendant filed a motion to augment the appellate record with transcripts associated with his first probation violation and disposition, which was denied by the Idaho Supreme Court. *Id.* The defendant then raised as issues on appeal the

questions of whether the Idaho Supreme Court denied him due process and equal protection when it denied the motion to augment and whether the district court abused its discretion when it revoked probation. *Id.* at 620-21. The Idaho Court of Appeals held that the transcripts of the prior probation proceedings were not necessary for the appeal because "they were not before the district court in the second probation violation proceedings, and the district court gave no indication that it based its revocation decision upon anything that occurred during those proceedings." *Id.* at 621. The Court of Appeals then clarified the scope of review for a revocation determination. Specifically, it held:

> [I]n reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

Id. (original emphasis) (citation omitted). This case has provided no more guidance than *Brunet* because it also holds that all the information known to the district court is relevant, but it fails to provide any explanation of the circumstances under which transcripts of the prior proceedings will be necessary to address sentencing issues on appeal.

Additionally, the instant case is distinguishable because *Morgan* only addressed the order revoking probation, and here Mr. Whitley is challenging the length of his sentence, which entails an analysis of "the entire record encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and

the revocation of probation."[2] *Hanington*, 148 Idaho at 28. Furthermore, whether the transcripts of the requested proceedings were before the district court at the time of the probation revocation hearing is not germane to the question of whether the transcripts are relevant to the issues on appeal because, in reaching a sentencing decision, a district court is not limited to considering only that information offered at the hearing from which the appeal was filed. Rather, the district court is entitled to utilize knowledge gained from its own official position and observations. *See Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak*, 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing

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[2] In *Morgan*, the Court of Appeals refused to address Mr. Morgan's claim that the Idaho Supreme Court denied him due process on the basis that it does not have the power to overrule a decision by the Idaho Supreme Court. *Id.* at 621. The *Morgan* Court went on to state that it would have the authority to review a renewed motion to augment if it was filed with the Court of Appeals after the appeal was assigned to the Court of Appeals and contained information or argument which was not presented to the Idaho Supreme Court. *Id.* However, this position is untenable because Idaho Appellate Rule 30 requires that all motions to augment be filed with the Supreme Court. The relevant portions of I.A.R. 30 follow:

> Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record.
>
> . . .
>
> Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court.

(emphasis added). Therefore, the *Morgan* Court's statement that Mr. Morgan could have filed a renewed motion to augment directly with the Court of Appeals is contrary to the Idaho Appellate Rules. Mr. Whitley recognizes that the Idaho Court of Appeals has recently rejected virtually identical arguments in *State v. Cornelison*, 154 Idaho 793 (Ct. App. 2013). However, Mr. Whitley disagrees with the holding in that case as far as it is inconsistent with the plain language contained in I.A.R. 30.

that the court could rely upon "the number of certain types of criminal transactions that [the judge] has observed in the courts within its judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected to disregard what he already knew about Gibson from the other case"). Thus, whether the prior hearings were transcribed or not is irrelevant, because the court may rely upon the information it already knows from presiding over the prior hearings when it made the sentencing decision after revoking probation.

The rationale behind this position comports with the Idaho Court of Appeals' reasoning in *State v. Adams*, 115 Idaho 1053 (Ct. App. 1989), where the Court of Appeals explained why the appellate courts should look to the entire record when reviewing the executed sentence:

> [W]hen we review a sentence ordered into execution after probation has been revoked, we examine the entire record encompassing events before and after the original judgment. We adopt this scope of review for two reasons. First, the district judge, when deciding whether to order execution of the original sentence or of a reduced sentence, does not artificially segregate the facts into prejudgment and postjudgment categories. The judge naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision. When reviewing that decision, we should consider the same facts. Second, when a sentence is suspended and probation is granted, the defendant has scant reason, and no incentive, to appeal. Only if the probation is later revoked, and the sentence is ordered into execution, does the issue of an excessive sentence become genuinely meaningful. Were we to adopt the state's position that any claim of excessiveness is waived if not made on immediate appeal from the judgment pronouncing but suspending a sentence, defendants would be forced to file preventive appeals as a hedge against the risk that probation someday might be revoked. We see no reason to compel this hollow exercise. Neither do we wish to see the appellate system cluttered with such cases.

Adams, 115 Idaho at 1055-56.

As such, when an appellant files an appeal from a sentence ordered into execution after the revocation of probation, the applicable standard of review requires an independent and comprehensive inquiry into the events which occurred prior to, as well as the events which occurred during, the probation revocation proceedings. The basis for this standard of review is that the district court "naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision." *Id.* It follows that, "[w]hen reviewing that decision, [an appellate court] should consider the same facts." *Id.* The Court of Appeals did not hold that the district court must expressly reference prior proceedings at the probation disposition hearing in order for this scope of review to become applicable. To the contrary, the Court of Appeals presumed the judge would automatically consider prejudgment events when determining what sentence should be executed after revoking probation. This is consistent with the Idaho Supreme Court precedent. *See Sivak*, 105 Idaho at 907. And, although the *Brunet* Court could have altered this standard, it did not do so.

Since the requested transcripts are within the applicable scope of review, the Idaho Supreme Court's decision to deny Mr. Whitley access to those transcripts constitutes a due process and equal protection violation. In *Lane v. Brown*, 372 U.S. 477 (1963), a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly, in Idaho, an appellant must provide an adequate record or face procedural default. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, ... and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999); *see also*

State v. Beason, 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko*, 108 Idaho 872, 873 (Ct. App. 1985). If the transcripts are missing, but the record contains court minutes which are sufficient to allow a meaningful review of an appellant's claim, then the transcripts are not necessary for review even though the Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide . . . [a] record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Whitley fails to provide the appellate court with transcripts necessary for review of his claim, the legal presumption will apply and Mr. Whitley's sentencing claims will not be addressed on their actual merits. If it is state action, combined with Mr. Whitley's indigency, which prevents him from access to the necessary transcripts, then such action is a violation of the equal protection and due process clauses of the Fourteenth Amendment and any such presumption should no longer apply.

Moreover, and in light of the denial of the transcripts, the foregoing presumption should be reversed in this case, and what occurred at those hearings should be presumed to discredit the district court's final sentencing decision. When Mr. Whitley was first given the opportunity for probation, the district court must have found that the circumstances were right to give him an opportunity to be a member of society. To ignore the positive factors that were present at the previous hearings presents a negative, one-sided view of Mr. Whitley. Denial of access to the requested transcripts has prevented Mr. Whitley from addressing those positive factors in support of his appellate sentencing claims. In light of that denial, Mr. Whitley argues that the events which occurred at the subject hearings should be presumed to invalidate the district court's final sentencing decisions in this matter.

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny an indigent defendant transcripts necessary for a merits-based review on appeal. In this case, the requested transcripts are necessary to address the issues on appeal because the applicable standard of review of an appellate sentencing claim requires the appellate court to conduct an independent review of all of the proceedings before the district court. Under this standard of review, the focus is not entirely on the district court's express sentencing rationale[3]; to the contrary, the question on appeal is whether the record itself supports the district court's ultimate sentencing decision.

D. The Idaho Supreme Court, By Failing To Provide Mr. Whitley With Access To The Requested Transcripts, Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and its progeny and held that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the Court recognized a due process right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

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[3] Both the United States Supreme Court and the Idaho Supreme Court have consistently held that due process requires trial courts to expressly articulate, on the record, their rationale for revoking probation in order to facilitate an effective merits based review of those decisions. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also State v. Chapman*, 111 Idaho 152 (1986), *supra*.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California*, 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he supports his client's appeal to the best of his ability." *See also Banuelos v. State*, 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcripts prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is factual support either in favor of any argument to be made or undercutting an argument. Therefore, Mr. Whitley has not obtained review of the court proceeding based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau*, 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card*, 121 Idaho 425 (1991)), the Idaho Supreme Court held that the starting point for evaluating whether counsel renders effective assistance of counsel in a criminal action is the American Bar Association's "Standards For Criminal Justice, The Defense Function." These standards offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking substance.

Standards 4-8.3(b). In the absence of access to the requested transcripts, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's sentencing determination at issue. Further, counsel is unable to advise Mr. Whitley on the probable role the transcripts may play in the appeal.

Mr. Whitley is entitled to effective assistance of counsel in this appeal, and effective counsel cannot be given in the absence of access to the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Whitley his constitutional rights to due process and equal protection which include a right to effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcripts and should be allowed the opportunity to provide any necessary supplemental briefing raising issues or arguments which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Whitley's Probation

Mr. Whitley asserts that, given any view of the facts, the district court abused its discretion when it revoked his probation. When a defendant appeals from an order revoking probation, the Idaho Court of Appeals has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct. App. 1987) .

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Mr. Whitley is not challenging the district district's finding that he violated the terms of his probation. Accordingly, he only contests the district court's decision to

revoke his probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with the protection of society." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001).

Mr. Whitley recognizes his probation was not perfect. However, trial counsel noted that Mr. Whitley has a tendency to be lazy while on probation and, for that reason, he ends up with probation violations. (Tr., p.23, Ls.18-23.) However, he has a lot of ability and with the appropriate motivation he could succeed on probation. (Tr., p.24, Ls.16-19.) For example he did maintain steady employment with the same employer while on probation. (PSI, pp.11-12.) Mr. Whitley was willing to participate in a specialty court program like drug court. (Tr., p.22, Ls.17-19, p.27, Ls.3-6.)

Additionally, Mr. Whitley's family support will help him when he is released from custody. For example, the mother of Mr. Whitley's child and Mr. Whitley's mother both displayed their support for him by attending the final probation violation disposition hearing. (Tr., p.24, Ls.11-15.)

Mr. Whitley also accepted responsibility for his actions in this matter including his most recent probation violations. (Tr., p.26, Ls.22-24.)

In sum, Mr. Whitley's problems on probation largely stem from a lack of motivation, which could be changed if he was provided with the appropriate supervision while on probation.

III.

The District Court Abused Its Discretion When It Denied Mr. Whitley's Oral Rule 35 Motion For A Sentence Reduction

Mr. Whitley argues that the unified sentence of fifteen years, with five years fixed, is unduly harsh when it is viewed in light of the mitigating factors present in this matter. A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.*

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Whitley does not allege that his

sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Whitley must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

"Where an appeal is taken from an order refusing to reduce a sentence under Rule 35, [the appellate court's] scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce." *Arazia*, 109 Idaho at 189.

As a preliminary note, Mr. Whitley incorporates the mitigating information contained in Section II, *supra*.

There are various mitigating factors present in this matter which support the conclusion that Mr. Whitley's sentence is excessive. Specifically, Mr. Whitley was only eighteen years old when he was originally sentenced. (R., p.35.) Prior to the original sentencing hearing, Mr. Whitley received a support letter from a high school counselor indicating that he was capable person with a good personality. (PSI, p.144.) He also received letters from his friends and family indicating that he has a good character. (PSI, pp.302-303.) Mr. Whitley expressed his remorse for his actions and recognized that he could have either attempted to stop the underlying offense or, at a minimum, walked away before it occurred. (R., p.155.)

Additionally, Mr. Whitley's rider performance is a mitigating factor. Mr. Whitley performed well on both of his riders and received two probation recommendations from the Department of Correction. (PSI, pp.126, 137.) While on his first rider, Mr. Whitley

earned an A in his writing course. (PSI, p.136.) Mr. Whitley also earned his GED. (PSI, p.11.) Mr. Whitley completed over 100 hours of community service. (PSI, p.136.) The Department of Correction noted that this is important because the average inmate only does the bare minimum to get a probation recommendation. (PSI, pp.136-137.)

While on his second rider, he also completed 40 hours of community service. (PSI, p.125.) Mr. Whitley only received "good" comments about his participation in the workforce readiness program. (PSI, p.124.)

In sum, Mr. Whitley's sentence is excessively harsh when it is viewed in light of the mitigating factors present in this matter.

CONCLUSION

Mr. Whitley respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues or arguments which arise as a result of that review. In the event this request is denied, Mr. Whitley requests that this case be remanded with instructions to place him on probation. Alternatively, Mr. Whitley respectfully request that this court reduce the fixed portion of his sentence be reduced. Alternatively, Mr. Whitley respectfully requests that this Court reduce the indeterminate portion of his sentence.

DATED this 18th day of February, 2014.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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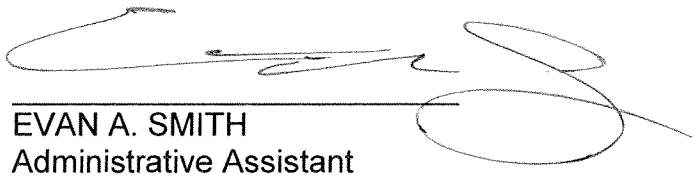

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